TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 210.

THE UNITED STATES *EX RELATIONE* [illegible]
HOLLENDORF, PLAINTIFF IN ERROR,

vs.

JOHN HAY, SECRETARY OF STATE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED [illegible], 1908.

(16,825.)

(18,825.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 8, 1904.

1 In the Court of Appeals of the District of Columbia.

THE UNITED STATES *ex Relatione* FERDINAND HOLZENDORF, Appellant,
vs.
JOHN HAY, Secretary of State. } No. 1249.

Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* FERDINAND Holzendorf, Petitioner,
vs.
JOHN HAY, Secretary of State, Respondent. } No. 45565. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Petition for Writ of Mandamus.

Filed August 5, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* FERDINAND Holzendorf
vs.
JOHN HAY, Secretary of State, Defendant. } At Law. No. 45565.

Justice of the honorable the supreme court of the District of Columbia:

The petition of Ferdinand Holzendorf respectfully represents:

I. That your petitioner is a native of Germany, but, by naturalization, a citizen of the United States, and entitled to due protection and redress against any and all losses, insults, wrongs, injuries and damages by him, as such, sustained, while sojourning in any part of any foreign country, anything in the internal constitution of such foreign country to the contrary notwithstanding.

But, nevertheless, that your petitioner, while bearing the passport of the Department of State of the United States, was, on the eleventh day of May, 1898, falsely imprisoned in the asylum for insane at Dalldorf, near Berlin, and there most oppressively and unjustly detained until and beyond the eighth day of July, 1899, when he was declared by the highest court of Berlin, the

2

Landgericht, to be, and to have been perfectly sound in mind and body and that, since his return to Germany, there is no evidence of his being publicly dangerous, as up to that time, he has been quiet and peaceable.

II. Your petitioner further says that, ignoring the premises, and, basing its non-action upon irrelevant matters and things twenty years anterior to the petitioner's American citizenship and to the injuries herein complained of, the said Department of State, through John Hay, its Secretary, the defendant herein, refuses to proceed, on the part of the United States, to seek to obtain redress of grievances in behalf of your petitioner, to the manifest failure of justice, against the policy and dignity of the United States and in derogation of the rights, privileges and immunities of all the citizens thereof.

III. Your petitioner further says that he has never been lax, or remiss, in his efforts, through the Department of State, to obtain redress of grievances against the country, which so unjustly, and so manifestly in contempt of his rights as a citizen of the United States, oppressively deprived him of his liberty, reputation and time, greatly to his cost, loss, damage and injury; but that he has persistently pressed the legation at Berlin, the State Department and the President for vindication of his rights, as a citizen of the United States.

IV. Your petitioner further says, that there are on file in the Department of State certain papers relevant to the injuries endured by him, as an American citizen, such as the correspondence, extending from the twelfth day of May, 1898, to the eighth day of May, 1902, between the petitioner as an American citizen in distress, and the American consulate general, the American embassy at Berlin and the executive department at Washington, D. C., and also papers reported to the said Department of State by our legation at Berlin, some of which may be deemed relevant to the just claim of your petitioner, viz., transcript of that decision of the said court, Landgericht, in favor of your petitioner, which is marked as Exhibit "B" in or concerning the report of Andrew D. White, our ambassador at Berlin.

V. The petitioner says that he demands that the facts in this cause be tried by a jury.

Wherefore, your petitioner prays that the honorable writ of mandamus, under seal of the supreme court of the District of Columbia, do issue, addressed to said defendant, John Hay, Secretary aforesaid, commanding and requiring him forthwith to institute vigorous and proper proceedings against the Empire of Germany, or Kingdom of Prussia, or both, that is to say, against the Emperor, for the recovery of five hundred thousand — ($500,000) damages, in behalf of your petitioner.

And your petitioner will ever pray &c.

(Signed) FERDINAND HOLZENDORF, *Petitioner.*

(Signed) R. S. THARIN,
1229 *Pa. Ave., Washington, D. C.,*
Attorney for Petitioner.

3 UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Personally appeared before me, Ferdinand Holzendorf, who being first duly sworn, deposes and says that he has read, or has heard read the foregoing petition; that he is the petitioner named therein; that the facts therein stated on his own knowledge are true; and that the facts therein stated on information and belief, he believes to be true.

(Signed) FERDINAND HOLZENDORF.

Subscribed and sworn to before me, this 5 day of August, A. D. 1902.

(Signed) EDW'D S. CLARKSON,
Notary Public.

Notice to Defendant.

The defendant is to plead hereto on or before the — day of ——, 1902.—Otherwise judgment.

(Signed) R. S. THARIN,
Pro Petitore.

Order Denying Prayers, &c.

UNITED STATES *ex Rel.* FERDINAND HOLZENDORF
v.
JOHN HAY, Secretary of State. } At Law. No. 45565.

In the matter of the application of Ferdinand Holzendorf for a writ of mandamus.

AUGUST 5, 1902.

That matter came on for hearing on the said petition, and was argued by counsel and considered by the court.

It is thereupon *ordered*, that the said application be, and the same is hereby denied, and the petition dismissed.

A. B. HAGNER,
Asso. Justice.

From the above order the relator prays that his appeal to the Court of Appeals of the District of Columbia be allowed by the court.

Dated, August 5, 1902.

R. S. THARIN,
For Relator.

Appeal allowed.
Aug. 5, '02.

A. B. HAGNER, *Justice.*

Note.

My reasons, in general, for refusing the within application are:

1. No clear legal right on the part of the petitioner to the writ is made to appear from the petition.

4 2. No clear legal duty on the part of the Secretary of State to perform the acts required is made to appear.

2 Mackey, 507, U. S. *ex rel.* Warder *v.* Chandler.

3. The matters involved concern the political department of the Government.

4. Said performance would require the exercise of *official discretion* on the part of the Secretary, and they are not of a ministerial character.

There are other considerations growing out of the personality of the petitioner, which sustain the propriety of this action.

A. B. HAGNER,
Asso. Justice.

Order for Citation.

Filed August 8, 1902.

In the Supreme Court of the District of Columbia, Friday, the 8th Day of August, 1902.

U. S. *ex Rel.* FERDINAND HOLZENDORF
vs.
JOHN HAY, Secretary of State.
} At Law. No. 45565.

The clerk of said court will please issue citation to the defendant in the above-entitled suit.

R. S. THARIN,
Attorney for Relator (1229 *Pa. Ave.*).

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* FERDINAND Holzendorf
vs.
JOHN HAY, Secretary of State.
} At Law. No. 45565.

The President of the United States to John Hay, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant

to an appeal noted in the supreme court of the District of Columbia, on the 5th day of August, 1902, wherein Ferdinand Holzendorf is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this eighth day of August, in the year of our Lord one thousand nine hundred and two.

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN, *Ass't Clerk.*

5 Service of the above citation accepted this — day of —— 190–.

——— ———,
Attorney for Appellee.

[Endorsed:] (3) No. 45565. Law. 8. United States *ex rel.* Ferdinand Holzendorf *vs.* Jno. Hay, Secretary of State. Citation. Issued Aug. 8", 1902. Served copy of the within citation on A. A. Adee acting Secretary of State Aug. 9, 1902. Aulick Palmer marshal. B. R. S. Tharin attorney for appellant.

Memorandum.

August 28, 1902.—Bond for costs ($50) filed.

Order for Record.

Filed August 28, 1902.

In the Supreme Court of the District of Columbia, Thursday, the 28th Day of August, 1902.

UNITED STATES *ex Rel.* F. HOLZENDORF
vs.
JOHN HAY, Secretary of State.
} At Law. No. 45565.

The clerk of said court will please prepare transcript on appeal.

R. S. THARIN,
Attorney for Appellant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 9, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia in cause No. 45565, at law, wherein The United States, *ex relatione* Ferdinand Holzendorf, is petitioner and John Hay, Secretary of State, is respondent, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19″ day of September, A. D. 1902.

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1249. The United States *ex relatione* Ferdinand Holzendorf, appellant, *vs.* John Hay, Secretary of State. Court of Appeals, District of Columbia. Filed Sep. 29, 1902. Robert Willett, clerk.

6 TUESDAY, *November 4th, A. D.* 1902.

THE UNITED STATES *ex Relatione* FERDINAND HOLZENDORF, Appellant, *vs.* JOHN HAY, Secretary of State. } No. 1249.

The argument in the above entitled cause was commenced by Mr. R. S. Tharin, attorney for the appellant.

WEDNESDAY, *November 5th, A. D.* 1902.

THE UNITED STATES *ex Relatione* FERDINAND HOLZENDORF, Appellant, *vs.* JOHN HAY, Secretary of State. } No. 1249.

The argument in the above entitled cause was continued by Mr. R. S. Tharin attorney for the appellant, and by Mr. Ashley M. Gould attorney for the appellee, and was concluded by Mr. R. S. Tharin, attorney for the appellant.

7 THE UNITED STATES *ex Relatione* FERDINAND Holzendorf, Appellant, *vs.* JOHN HAY, Secretary of State. } No. 1249.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

1. The appellant, Ferdinand Holzendorf, filed his petition in the supreme court of the District, on August 5, 1902, for a writ of mandamus to the Secretary of State, commanding him forthwith to institute "vigorous and proper proceedings against the Empire of Germany and the Emperor" thereof, for the recovery of damages, on behalf of petitioner, in the sum of $500,000. The grounds of petitioner's claims, as we apprehend them from the rather incoherent recitals of the petition, are substantially these: Petitioner, a naturalized citizen of the United States, visited Germany under a regular passport issued by the Department of State. On May 11, 1898, he was falsely imprisoned in an asylum for the insane at Dalldorf, Germany, where he was confined until July 8, 1899, and until released by decree of the court of last resort in the city of Berlin; that court finding that he had been sound in mind and body, quiet and peaceable, and not publicly dangerous since his return to Germany. The petitioner then alleged that he made application for relief to the consul-general and the ambassador of the United States to Germany, and to the executive department at Washington; and in this connection refers to an exhibit, as attached, containing that correspondence and a copy of the decree of the German court referred to in the statement of his case. This exhibit, if in fact filed below, does not appear in the transcript of the record which has been filed by the appellant in this court. The learned justice to whom the petition was submitted, declined to lay a rule upon the Secretary of State to show cause why the writ should not issue, but dismissed the petition after hearing given to the petitioner's counsel in support of his demand.

2. The first error assigned is on the refusal to lay a rule upon the defendant. Article 1274 of the Code of the District, embraced in chapter XLII, under title of mandamus, reads as follows: "Upon the filing of such petition the court may lay a rule requiring the defendant therein named to show cause, within such time as the court may deem proper, why a writ of mandamus should not issue as prayed, a copy of which rule shall be served upon such defendant by a day to be therein limited."

The contention is that the word may, as used in the article quoted, is mandatory, and that it was the duty of the justice to lay the rule without regard to the merits of the petition. Practically, the appellant has sustained no injury from the failure to lay the rule, as he

had his hearing, and the action had was nothing more than would have followed the appearance of the defendant and a hearing upon a demurrer.

Whilst the signification of "may," in the construction of a statute, is ordinarily permissive, it is quite true that it will be regarded as bearing the ordinary sense of "must" and "shall," when it can be seen that the real intention of the legislature was to impose a duty and not to confer a discretionary power. In other words, whether the word shall be treated as permissive or mandatory, depends upon what may be ascertained to be the general intent and purpose of the statute. See 20 A. & E. Encyc. Law, 2 ed. 237: Title—May—where the numerous cases involving the interpretation of the word in different statutes, are collated.

In accordance with what we apprehend to be the real legislative intent, apparent in article 1274, we are of the opinion that the word "may" was used therein in its permissive sense. The entire chapter of the Code deals with practice or procedure, a subject that, from its very nature, must ever be left, in most of its details, to the judicial discretion. Article 1274 was intended to lay down a general rule of practice for the protection of defendants from hasty and ill-advised action in such cases, and to that extent is mandatory: the defendant must have notice and opportunity to be heard before the peremptory writ can issue. No similar reason applies in the case of the petitioner. It is of no practical consequence to him whether his petition be denied without notice to the defendant, or after, so that he have opportunity to be heard in its support, and to appeal from the denial. Appeal in either event brings up his entire case to the same extent and in the same manner. Apparently, it was the general intention in ordinary cases—an intention that will no doubt be conformed to in practice—that the petition shall not be critically scrutinized as a preliminary to laying the rule; but it does not necessarily follow that there was a further intention to compel the laying of the rule, notwithstanding it may clearly appear that the petition discloses no possible ground for relief. Such an intention ought to be plainly expressed, and not left to inference merely. We see nothing in article 1274 that requires a reversal of the established practice of the District, which was, as once stated by the court in general term, to "refuse the preliminary order, if the petition itself shows that further proceedings would be a waste of time and would ultimately prove futile." U. S. *ex rel.* Warden *v.* Chandler, 2 Mack. 527, 534. (A. D. 1883.)

3. The court did not err in dismissing the petition. Conceding the contention, for the sake of the argument, and without pausing to discuss whether it so distinctly appears in the petition, that there has been a flagrant abuse or the rights of petitioner as a citizen of the United States, by the officials of a foreign nation, yet the injury is not one of judicial cognizance in the United States. The duty of righting the wrongs that may be done to our citizens in foreign lands is a political one, and appertains to the executive and legisla-

tive departments of the Government. The judiciary is charged with no duty and invested with no power in the premises.

Even if the legislative department have the power, it has not, so far, undertaken to impose upon the Secretary of State the duty of presenting and urging all claims for redress in such cases that American citizens may submit to him for action.

When such duty shall have been imposed by statute, it will be time enough to consider the power to impose it, and, if ascertained to exist, then to further consider whether the performance of the duty in a given case is one that necessarily involves the exercise of discretion. Whatever duty may be owed to a citizen in such cases is, as before stated, a political one, because it involves the relations of the United States with foreign nations; and the performance of that duty in its incipient stage necessitates negotiation which is exclusively the function of the executive department. The powers of that department are vested in the President, and he it is that conducts all intercourse with foreign governments, notwithstanding he may habitually act through the agency of a Secretary of State appointed for the purpose. The latter is the confidential political agent of the President for the execution of his will in matters committed to his discretion by the Constitution. To coerce the action of the Secretary, therefore, is to attempt the coercion of the President; and, as was said in Marbury *v.* Madison, (1 Cr. 137, 166) "Nothing can be more perfectly clear than that their acts are only politically examinable." See also Brown *v.* Root, 18 App. D. C. 239, 242.

For the reasons given, the judgment will be affirmed with costs. It is so ordered.

Affirmed.

8 TUESDAY, *December 2d, A. D.* 1902.

THE UNITED STATES *ex Relatione* Ferdinand Holzendorf, Appellant,
vs.
JOHN HAY, Secretary of State.
No. 1249. October Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

December 2, 1902.

9 TUESDAY, *December 9th, A. D.* 1902.

THE UNITED STATES *ex Relatione* FERDINAND HOLZENDORF, Appellant,
vs.
JOHN HAY, Secretary of State.
} No. 1249.

On motion of Mr. R. S. Tharin of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond is fixed at the sum of one hundred dollars.

10 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you or some of you, between The United States, *ex relatione* Ferdinand Holzendorf, appellant, and John Hay, Secretary of State, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of December, in the year of our Lord one thousand nine hundred and two.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

11 (*Bond on Writ of Error.*)

Know all men by these presents, that we, Ferdinand Holzendorf, appellant, as principal, and Michael M. Frey, as surety, are held and firmly bound unto John Hay, Secretary of State of the United States, appellee, in the full and just sum of one hundred dollars ($100.00) to be paid to the said John Hay, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 24″ day of December, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between The United States *ex relatione* Ferdinand Holzendorf *versus* John Hay, Secretary of State a judgment was rendered against the said appellant, Ferdinand Holzendorf, and the said appellant, by his attorney of record R. S. Tharin, Esq., having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Hay, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Ferdinand Holzendorf shall prosecute said writ of error to effect, and answer all damages and costs if he should fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FERDINAND HOLZENDORF. [SEAL.]
MICHAEL M. FREY. [SEAL.]

Sealed and delivered in the presence of—

A. C. HENRY.
A. J. VOLBRECHT.

Approved by—

M. F. MORRIS,
Associate Justice, Court of Appeals of the District of Columbia.

[Endorsed:] No. 1249. The United States, *ex relatione* Ferdinand Holzendorf, appellant, *vs.* John Hay, Secretary of State Bond on writ of error to Supreme Court U. S. Court of Appeals District of Columbia. Filed Jan'y 8, 1903. Robert Willett, clerk.

12 UNITED STATES OF AMERICA, *ss:*

To John Hay, Secretary of State, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The United States *ex relatione* Ferdinand Holzendorf is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 8th day of January, in the year of our Lord one thousand nine hundred and three.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted
ASHLEY M. GOULD,
Attorney for Defendant.

Jan'y 8, 1903.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 8, 1903. Robert Willett, clerk.

13 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 12, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States, *ex relatione* Ferdinand Holzendorf, appellant, *vs.* John Hay, Secretary of State, No. 1249, October term, 1902, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 9th day of January, A. D. 1903.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,825. District of Columbia Court of Appeals. Term No. 210. The United States *ex relatione* Ferdinand Holzendorf, plaintiff in error, *vs.* John Hay, Secretary of State. Filed February 6th, 1903.

FILE COPY.

Office Supreme Court U. S.
FILED
APR 2- 1904
JAMES H. McKENNEY,
Clerk.

(18,825.)

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 210.

THE UNITED STATES, *ex relatione*, FERDINAND HOLZENDORF,
Plaintiff-in-Error,
vs.
JOHN HAY, Secretary of State,
Defendant-in-Error.
} No. 210.

In Error to the Court of Appeals of the District of Columbia.

BRIEF OF R. S. THARIN, ESQ., ATTORNEY FOR PLAINTIFF-IN-ERROR.

(*Filed* , *1904.*)

Statement.

This is the case of Ferdinand Holzendorf, a citizen of the United States, who, as such, is entitled to due *redress* for losses, insults, wrongs, injuries and damages arising from his false detention as a lunatic by the Prussian Government, whilst, *mente sana in corpore sano*, "peaceably and quietly" sojourning, whilst bearing the passport of a Secretary of State, as an American citizen, in Berlin.

When first imprisoned, he applied to the American Consulate and Embassy for *protection* and addressed a letter to the President of the United States, asking for *release*, which may not have reached him, as it never received any attention; and so he *appealed* from the sentence of the inferior court, which had adjudged him insane, to the Landsgericht, the royal court of appeal in Berlin, which *decided* that he was perfectly sound in mind and body, and had not, when so adjudged, been insane; that since his return to Germany as an American citizen, *temporarily there sojourning*, his *domicil* being in the State of Utah, United States of America, he had been "quiet and peaceable," that the Amtsgericht Court was "without competent jurisdiction;" that there were "no legal grounds" for his arrest, or confinement; and that all the charges against him were founded upon irrelevant matter many years anterior to his American citizenship and therefore *"entirely out of the question."*

His confinement began on the eleventh day of May, 1898, and he was unjustly detained until the ~~eighth~~ 22d day of ~~July~~ Aug., 1899, at Dalldorf, near Berlin.

Not having received the *"protection"* due to him whilst suffering in a German prison, the plaintiff seeks *redress* through the Department of State, as the only channel, there *being no German courts to pass upon his claim for indemnity*, and thus suffering from a denial of justice. After all his efforts, if he is now told that his citizenship is unsubstantial and his rights non-existent, he is left entirely without remedy, the Government having refused to interfere in his behalf, whether for his *release*, or *protection*, or for *redress*, or *indemnity*.

That decision of the Landgericht in his favor being in both the German and English languages in possession of the defendant, the petitioner, when applying for man-

damus, in the *preliminary* petition, could only aver and refer to it. It was for the defendant, when responsive to the rule, to be subpoenaed, to bring it with him into court, and so it was referred to in the petition, not as an Exhibit "attached" to the petition (see Opinion, Record p. 7, part 1); but as "Exhibit B, in or concerning the *report* of Andrew D. White, our Ambassador at Berlin," made to the Secretary of State. (See Record, part IV, p. 2.) Since the action of the trial-justice, the attorney for the plaintiff obtained power of attorney from his client—not being permitted as his attorney at law—to inspect the files of the Department *quoad* the plantiff, and copied the decision, which being well known to the defendant and actually used by his assistant, Secretary Loomis, and forwarded to the Ambassador at Berlin for report, is hereinafter set out, as subsequently certified by the Secretary of State, for the information of this court now in supreme charge of the entire case and the merits thereof. The decision is properly prefigured by the following letter, also used by the Defendant:

"Prerauer, attorney practicing in the Royal Landsgericht (I) Civil Court, and Notary Masson, attorney in the Royal Landgericht (II) Berlin, W. Charlotte street, 65.

"Berlin, January 24, 1900.

"Mr. Ferdinand Holzendorf,

"Washington, D. C.

"Dear Sir:

"In regard to your demand for indemnity, as I have told you before, a lawyer here can do you no good, *as our laws do not provide for the same.*

"However, I do not consider it impossible that, when the State Department at Washington should take up the matter and direct the American Embassador to this country to present the matter to our Government, claim-

ing damages, whether based upon international motives, or others, that satisfaction might be obtained, *as it has been conclusively proven by sentence of the courts of this country that your confinement, imprisonment, or detention here was without legal grounds.*

"Very respectfully,

"PRERAUER."

And this affiant, in this connection, very respectfully refers to the files of the said Department of State for the transcript of the original decision of the said court of final resort of said foreign country in the German language with the translation thereof, referred to in the petition (see Record, p. 2, part IV), marked Exhibit "B" of the report of Embassador Andrew D. White," a copy of which certified translation is as follows:

"IN THE NAME OF THE KING:

"The case of the "Privatier," retired business man, Ferdinand Holzendorf, at the present time in the asylum at Dalldorf, Plaintiff:

Counsel:

"Attorney Prerauer, at Berlin, versus the Royal First Prosecuting Attorney for the State, of the Supreme Court of Berlin.

"By reason of a protest against the Decision of the Court, declaring the Appellant "non compos mentis" and placing him under guardianship, the Court of Cassation of the Royal Court at Berlin—No. 20—after the oral trial of June 28, 1899, in co-operation with the president (Director) v. Erhaust; of the judge at Doering; of the Associate Judge (Gerichts-Assessors) Bruggerman, has passed

"SENTENCE:

"That *the decision of the royal court* (Amts-Gericht) *at Berlin, sub-division 81, Dec. 28, 1898, depriving Ferdinand Holzendorf of his civil rights,—placing him under*

guardianship, is hereby reversed. The costs of the proceedings shall be imposed on the royal treasury and the same will be ordered to *remunerate (indemnify) the plaintiff for the accrued costs.*

"STATEMENT OF FACTS:

"By sentence of the Royal Corporation Court (Amts-Gericht) of Berlin, subdivision 81, Dec. 28, 1898, the Plaintiff was declared "non compos mentis" and placed under guardianship. Now *he* proposes (moves) that the adverse decision be reversed and that the costs of the proceedings be placed on the State, vindicating himself as follows:

"The argument upon which the opinion of the two judicial experts was based, by virtue of which he was declared non compos mentis, is not justified by the result of the inquiry, or examination. It must be considered that he was certain (the plaintiff) of being acquitted of the charge of *lese majestie*—insult to the king—and that he had lost his official position on account of said charges. This conviction aroused in him a certain excitement, afterwards augmented by the harsh treatment he suffered in the different asylums in which he was confined.* This cannot however, be termed "Lunacy."

"When he denounced the murder of an inmate of the asylum at Haina by his attendant, the account was *proven to be true.* He now insists on claiming damages, or indemnification, for the terrible treatment inflicted on him at Haina and his detention in other asylums * and for this purpose alone, came to Germany.

"In America, he was fortunate from the very first; he is there mine and real estate owner, no one there doubting the soundness of his mind. *If* he menaced members of the royal household,* it was merely a momentary outburst of feeling and not seriously meant by any means."

"The *defendant* maintains, however, that complainants, although deranged, are entitled to respect and moves;

"To dismiss the action brought by the plaintiff;

* Not when an American citizen.

Proof has been offered, in conformity with the decision of March 18, 1890, concerning the accusation of the parties, viz: the following documents— *

1st. From the State hospital at Haina, concerning the plaintiff;

2nd. From the Insane asylum at Frankfort-on-the-Main, concerning the plaintiff, No. 1614;

3rd. From the royal corporation (Amts-Gericht) Hoechst-on-the-Main, E-2-87;

4th. From the royal police of this place (Presidium) (prison) H. 69, 606;

5th. From the insane asylum at Marburg H, 317;

6th. From the royal corporation Court (Amts-Gericht) I, at Berlin, E, 188-98, have been offered for consideration and made objects in the case.

"Further: The health officer (Sanitaetsrath) Dr. Leppman, was heard as expert. Both of his written statements of May 10th and June 24th, 1899, are to be found among the papers of the case and are herewith taken into consideration.

"The Authorities at Salt Lake city (county), North America, have been asked to report the financial condition, possible arrest, scandal and general conduct of plaintiff. *According to the report of the royal German consulate at San Francisco,* of April 25, 1899 (page 33 of the Records) which are hereby referred to, *it has not been possible to obtain the desired information. On the other hand,* the plaintiff has remitted the notarial (proceedings) certificate found on page 57 of the Records of *April 22, 1899.* The contents of the same will be here produced and considered. They concern the entries found on page 15 of the Record, which was furnished by the plaintiff, especially the certificate of August 22, 1885, and the two documents written in the English language.

"In the presence of experts, the plaintiff was personally examined. Concerning these proceedings, reference may be had to the contents of the record of said examination of June 28, 1899.

"After complaint of the plaintiff, the INCOMPE-

1st to 5th inc.

* 1st, 6th. 20 years before he became an American citizen.

TENCY of the LOWER COURT (Amts-Gericht) has been decided for the following reasons:

"The judgment of the lower court (Amts-Gericht) has been necessarily REVERSED on formal, as well as on material grounds.

"According to the provision of the
"Civil Procedure,
p. 594,

the Corporation Court (Amts-Gericht) is competent to place a person under guardianship (declare a person non compos mentis) where the person concerned has his general legal rights. General civil rights of a person are determined by his *dwelling place* (p. 12 Civ. Proc. provision); *only when he has no domicile* by the place of sojourn—in Germany—by the *last* domicile (*p. 18 C. P. P.*) The plaintiff is now a land and mine owner in Salt Lake County, North America, and is *undoubtedly legally domiciled there.* He came to Germany for the sole purpose of further prosecuting his claim for damages; his *sojourn* here is, therefore, *only transitory* and it cannot be supposed that he has intended making his home in Berlin.

"Page 18 of the Civ. Proc. Regulations cannot in this case be applied; nor, likewise, paragraph 2, of the Regulations of the Civ. Proc., as the plaintiff, as shown in the records transmitted by him, *is no longer a German Subject;* but has become *an American citizen*, who has *not* given up his *domicile*, but is *temporarily* in Germany; wherefore, IT IS NOT LAWFUL THAT HE SHOULD BE IMPRISONED HERE, OR PLACED UNDER GUARDIANSHIP, AS THE COURTS OF GERMANY ARE NOT COMPETENT TO HAVE JURISDICTION IN THE MATTER. (See Graupp, Commentaries on the Civil Procedure Regulations, p. 13, No. 4; also article 8, Emigrant Laws of the Law of Citizenship.)

"Aside from this,

there were not adequate grounds for placing plaintiff under guardianship, according to the opinion of the court having jurisdiction in the premises. The plaintiff made the impression by his straightforward manner of a man, who was able to give a satisfactory account of

his doings. He also answered all questions clearly and sensibly and gave absolutely none of the indications of lunacy, or idiocy, which persons so afflicted ordinarily manifest. From the behavior of the plaintiff, one would rather arrive at the conclusion that he is a NORMAL PERSON.

"The expert health-officer (Sanitaetsrath) Dr. Leppman, declared that the plaintiff was not responsible for his acts. Both opinions given by him have NOT been acceptable; BECAUSE THE GROUNDS UPON WHICH HE BASED HIS CONCLUSIONS WERE FACTS CONCERNING ACTS OF THE PLAINTIFF COMMITTED FIFTEEN YEARS BEFORE THE PLAINTIFF WENT TO AMERICA.

"The plaintiff has been this long time in America, and *from there the slightest thing to his detriment cannot be discovered.* When the plaintiff returned to Germany in order to prosecute his claim for damages, he applied, of course, to the War Department and to Baron v. Slumm. This is not to be taken as evidence against him; on the contrary, his manly frankness seemed entirely reasonable, if indemnification for damages were really due him (which, certainly, cannot be often enough repeated to the plaintiff is not the case). According to the opinion of the court, REPREHENSIBLE BEHAVIOR ON THE PART OF THE PLAINTIFF *after* his RETURN to *Germany*, OR THAT HE WAS DANGEROUS, IS ENTIRELY OUT OF THE QUESTION AS HE HAS, THUS FAR, CONDUCTED HIMSELF QUIETLY AND PEACEABLY.

"It must indeed be acknowledged that the plaintiff, according to the contents of the aforesaid papers, mentioned in the statement and his most recent behavior, suffers from the fixed idea that remuneration for damages is due him by virtue of his *previous* detention in insane asylums; furthermore, it must be conceded that according to the contents of the written documents presented by him, some time ago, especially those filed in the Records at Marburg, that he is a person extraordinarily opinionated.

"This fixed idea, although characteristic of the plain-

tiff, does NOT constitute, either dangerous depravity, or —and this is the main point—the inability to appreciate the results of his actions—irresponsibility.

"Therefore, there are not adequate grounds for depriving the plaintiff of his liberty and placing him under guardianship; and the REVERSAL of the Court's decision to that effect is, on these grounds, JUSTIFIED.

"Concerning the costs of the proceedings, they were imposed by the decision of the Court according to the statute of the Civil Procedure, p. 87 and p. 614.

Signed " v. Erhaust, Doering, Bruggman.

"Issued (executed) Berlin, July 18, 1899

Gutjahr, Clerk of the Court.

No. I, Court of Cassation, No. 20.

" Certified and sealed with the official seal of the Supreme Court (Kammergericht), clerk of the 3rd Civil senats, and of the General Court (Landsgericht) No. 1 Court of Cassation, No. 20."

As to the use of this decision, see New York Indians *v* U. S., 170 U. S., 32.

Questions Arising.

Q. 1. Is the vested right of a citizen to claim diplomatic interference by this government in favor of redress for flagrant oppression by a foreign government, defeasible, or alienable, by any branch of this government, however exalted, or by the arbitrary order of an associate justice of the Supreme Court of the District of Columbia however prejudiced, or by any public, or irresponsible official servant of the Sovereign People?

Q. 2. As plaintiff had the legal right to commence proceedings in mandamus by preliminary petition, was it not a denial of justice and a violation of Section 1280 of the Code to call that commencement an *ex parte* argument at the *preliminary* stage?

Q. 3. Did the legislature *intend* to leave the vested constitutional rights of a citizen at the mercy of any judicial officer, or of the Department of State, whether

informed thereof, whether prejudiced, whether negligent, or not, so as to make it practically possible for an innocent American citizen to suffer admitted flagrant and irredressible abuse of his vested rights abroad?

Q. 4. When the legislature* devolved upon the president the duty, when informed thereof, to demand *release* of an American citizen unjustly detained abroad, did it intend to leave *redress* of the wrong exclusively to the President alone, *sic volente, sic jubente*? On the contrary did not the legislature intend that the Secretary of State, when informed thereof (as per the Landsgericht decision, e. g.), should take all the necessary steps to begin diplomatically in the name of the Government and then, if necessary, to invoke the action of the president to enforce the just demand for indemnity?

Q. 5. When Section 1280 of the Code of the District of Columbia provides for an *ex parte* hearing *after* Sections 1273-'79 thereof shall have been first complied with, could the trial justice so conduct as to draw the attorney for the applicant for the *rule* into a remonstrance against his course and then so as to call the expostulation of the attorney an *ex parte* hearing on the merits of the case?

Q. 6. Could the justice of the appellate court below so construe Section 1274 of the Code as to divest a citizen of the United States of his right to mandamus, there being no other remedy?

Q. 7. Is not the flagrant abuse of the vested rights of an American citizen abroad, a matter for *judicial* cognizance here, *when* the *privilege* of the writ of mandamus is concerned?

Q. 8. Is it not frivolous on the part of the inferior jurisdiction against which the writ of error is addressed to act as if the petition of the plaintiff was without

* R. S., U. S., Sec. 2001.

merit, when it fully avers and refers to a final decision in his favor in the hands of the defendant and concisely states the tenor thereof, which could have been brought into court *ipsissimis verbis* of the decision referred to and fully sustained as sworn to at the proper time?

Q. 9. Had the trial justice the right to "*critically scrutinize the petition as a preliminary to laying the rule?*" (See Record, p. 8, from 28th line from top.)

Q. 10. Had the trial justice any right (and did not his oath forbid him) to insult the applicant for the rule as *persona non grata* to himself? (Ib. p. 4, note 95.)

Q. 11. What is the true construction of the word "may" in second line of Section 1274 of the Code, in the present instance? (See Record, p. 7, ¶2; also *post* p. 18.)

Specification of Errors.

(*a.*) It was error for the court below and the trial-justice to ignore the inalienable right of a citizen of the United States to pursue his remedy to obtain redress against the foreign country involved; and it is legally impossible for any official, however highly exalted, "to sport away the vested rights of others at his discretion."

Record last ¶ of "note," p. 4.
Marbury v. Madison, 1 Cr. 166.

(*c.*) To the question as to whose duty it is to diplomatically demand *redress,* it is futile to answer, "the President;" because the law, in view of the necessity for *prompt action* for the *release* of an American citizen (under the head of *protection*) is not to be forced to mean that the President himself is to personally institute diplomatic inquest into the question of *redress* of wrongs already suffered.

R. S., U. S., Sections 1999-2001; Cons. U. S. Art. XIV, Sec. 1.
Cons. U. S., Art. V, Amendments.

In applying to the Supreme Court of the District of Columbia for a rule against the diplomatic department of the Executive branch of the government, the plaintiff was entitled to orderly, regular and considerate procedure, in order that the Republic should receive no detriment in her most vital function. There should not have been undue haste on the part of the trial justice to dismiss the applicant, especially if the justice viewed the applicant as *persona non grata.* (See Record, note, p. 4., ¶5.)

(*b.*) It was error to hold that the trial-justice had a right to argue the defendant's side of the case from the bench, to deprive the plaintiff of his right to all the provisions of law, and to repeal Section 1280 of the Code by calling the remonstrances of counsel an *ex parte* hearing, as if counsel was addressing the Court for the issuance of the writ forthwith, when he was only applying for the rule to show cause to be laid upon the defendant, so that the mandamus proceedings could be conducted according to law. And it was error in the trial justice to adduce his own authority (2 Mack. 507 U. S. ex rel Warder *v.* Chandler) without having left the counsel to exercise his privilege to show the inapplicability of the same and the right to apply for subpoena duces tecum for the production of papers in the defendant's possession, and to amend the petition upon any demurrer which the *defendant alone* had the duty and the right in his own behalf, if deemed necessary, to propound at a subsequent stage of the proceedings.

"Opinion," bot. p. 7, top p. 8 of Record.
"Note," part 2, Ib. p. 4.
Sec. 1274 Code of the D. C., p. 18, *post.*

(*c.*) It was error in the Courts below to leave the *redress* of flagrant abuse of the right of our citizens suffered when sojourning abroad, from foreign governments on

the same footing as *protection* stands (Record, p. 9). Section 2,001 of the Revised Statutes of the United States places in the hands of the President the personal duty of demanding the "*release*" of the citizen from *prison*. The reason for this is that the prisoner, as such, cannot apply for redress to the Department of State and his *condition* demands prompt interference; but, in the case of this plaintiff, he was not a *prisoner*, when he applied to the trial-justice, but he was an American citizen entitled to indemnity for *past* outrages. To trouble the President *now* would be to ignore the fact that he would refer it to the State Department, to take the matter in hand diplomatically and act upon it in accordance with international law. Thus the statute (R. S., U. S., Sections 1999-2001) in effect provides, in view of the practice of the State Department, that the Secretary of State, without discriminating between native and naturalized citizens, shall proceed for redress, in the usual diplomatic manner, in conformity with the practice of the Department. ("Opinion," part 2, 2d¶, Record, p. 7 bot.)

"But when the legislature proceeds to impose on that officer (the defendant herein) other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts, he is *so far* the officer of the *law;* is amenable to the laws for his conduct and *cannot,* at his discretion, sport away the vested rights of others."

Marbury *v.* Madison, 1 Cr. 166.
Asst. Sec. Davis to Moseby, June 23, 1873.
Wharton, I. L. Dig., §241.

(*d.*) The court below erred in the use of the words: "without regard to the merits of the petition." The trial-

justice disregarded the merits of the petition and of the petitioner, and so did the Appellate Court below, as a mere inspection shows (see Record, pp. 1-3).

The petitioner, as a preliminary step, swears to having suffered flagrant abuse of his rights from the foreign government complained of and that, on appealing to the court of final resort in Berlin he was irreversibly declared perfectly sound in mind and body and a quiet and peaceable citizen of the U. S. whilst in Germany, as such, including all the time of his oppressive and unjust detention in a lunatic asylum at Dalldorf near Berlin, that he ineffectually applied for relief to the embassy there and to the President, and that the defendant, ignoring the premises and basing his non-action upon certain irrelevant charges, now refuses to seek redress in his behalf on the part of this government; and that herein is a manifest failure of justice against the dignity of the United States and in derogation of the rights, privileges and immunities of all the citizens thereof.

This is enough to put the defendant on his defense.

The trial justice seems to deny the *truth* of these verified allegations; for he considers that the legal right of the petition is not clear. But they are true and sufficient to have caused the justice to lay the rule; because it can not be proper in any judicial officer to divest an American citizen of his rights to *redress* for injuries sustained by him from the hands of any foreign government. If but one remedy exists, and if the claimant apply to a competent jurisdiction for that remedy, to refuse it in the manner it was refused, is to extinguish allegiance as well as redress, and treat the citizen as "dead to the world," as an outlaw without a country, without a home, and without owing the least allegiance

to the country which first neglected to protect him and now scornfully refuses to help him to redress his admitted injuries.

Record, p. 2, ¶ 2 of Petition.

(*e.*) It is error in the court below to say that the trial-justice did not err in dismissing the petition. The petition was dismissed by the trial-justice solely to prevent renewal of the application, and to forestall the right of amendment, as the order refusing the rule was interlocutory and the trial-justice had already allowed the appeal therefrom. Therefore, the order was by him made final as a means to extinguish the rights of the petitioner and to violate Sec. 1280 of the District-Code.

Record, p. 8 (part 3 of Opinion).

(*f.*) The Court erred in construing the meaning of section 1274 of the Code of the District of Columbia, so as to permit a Secretary of State to treat an American citizen as persona non grata, and to be aided by a justice of the Supreme Court of said District, "to sport away the vested rights of others at his mis-called 'discretion.'" (Ib. part 2, pp. 7, 8.)

(*g.*) The Court below erred in supposing that when we sought to avail ourselves of the privilege of Chapter 42 of the Code, we were *suing a foreign nation* in a Court in the United States. We were seeking to cause the United States Government through the regular diplomatic channel to demand indemnity from the foreign nation in accordance with international law. We sought to commence our proceedings against the recalcitrant defendant. (Opinion, part 3, Record pp. 8, 9.)

R. S., U. S., Sections 1999-2001.
Sections 1273, 1274, District-Code.

Indeed, it was *res adjudicata* by the judiciary of the foreign country *that plaintiff was falsely imprisoned,* and this alone forms the impregnable point in our claim. Our case is ready for settlement by the foreign nation which has already pleaded "guilty," whose royal treasury was mulcted for the costs and whose royal attorney general was defeated in his efforts to defend the government's side of the appeal.

Petition Record, part 1, ¶ 2.
Brief, p. 4.

(*h.*) The Court below erred in saying (Record, p. 9): "The ~~The Court below erred in saying (Record, p. 9): "The~~ judiciary is charged with no duty and invested with no *power* in the premises (Record, *top* p. 9). Congress has enacted the 24th chapter of the Code which is to be read pari materia with the Constitution and Sections 1999–2001 of the R. S. of the U. S.

(*i.*) The court erred in assuming that our contention is that all cases regardless of merit *must* be urged, i. e., even if there be some other remedy at law. On the contrary there *is* no other such remedy and it was error to (Opinion, Record, pp. 7. bot.; 8, 9) assume that our cause is without merit. (Ib. id.)

(*k.*) The Court erred in opining that practically the appellant sustained no injury from the failure to lay the rule; for the same Court, in the same opinion, uses words contradicting the above: "Apparently, it was the *general* (legislative) *intention* in ordinary cases—an *intention* that will no doubt be *conformed* to in *practice—that the petition shall not be critically scrutinized as a preliminary to laying the rule.*"

(*l.*) It was error for the appellate court below to sustain the gross "personality" of the trial-justice against the unoffending applicant for the rule.

"Opinion," Record, part 2, 2d ¶; Record, pp. 7 and 8.

"Note," ¶5, Record, p. 4.

(*m.*) It was *error* to decide that the word "May," in second line of Section 1274 of the Code is *not* mandatory, in the present case.

ARGUMENT.

PREFACE.

To facilitate argument and to comply with rule, the full text of the Statutes, pursuant to Art. V, Amendments Cons. U. S. applicable to this case are given.

See Question No. 1, p. 6, *ante*.

Section 1999, R. S., U. S.—"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle this gorernment has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the government thereof; and whereas it is necessary to the maintenance of public peace, that this claim of foreign allegiance should be promptly and finally disavowed. Therefore any declaration, instruction, *opinion, order,* or *decision* of *any officer* of the United States, which denies, *resricts, impairs,* or questions the right of expatriation is declarations *inconsistent with the fundamental principles of the Republic.*"

Section 2000, R. S., U. S.—All naturalized citizens of the United States, while in foreign countries, are entitled to and *shall receive* from this Gov-

ernment the same protection of persons and property, which is accorded to native-born citizens.

Section 2001 of the Revised Statutes of the United States:

"Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by, or under, the authority of of any foreign government it shall be the duty of the President *forthwith* to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall *forthwith* demand the *release* of such citizen, and, if the release so demanded is unreasonably delayed, or refused, the President shall use such means, not amounting to acts of war as he may think necessary and proper to obtain, or effectuate, the *release;* and all the facts and proceedings relative thereto shall, as soon as practicable be communicated by the President to Congress."

From Code of District of Columbia:

"Sec. 1273.—How Applied for. All applications for granting writs of mandamus shall be *commenced by petition*, verified by affidavit of the Applicant, setting forth fully the ground of his application.

"Sec. 1274.—Rule on Defendant. Upon the filing of such petition the Court may lay a rule requiring the defendant therein named to show cause, within such time as the Court may deem proper, why a writ of mandamus should not issue, as prayed, a copy of which rule shall be served upon such defendant by a day to be therein limited."

Sec. 1275.—Defendant's answer; 1276 pleadings and proceedings; 1277, time of trial of issue; 1278, trial; 1279, judgment, if for defendant; costs, etc.

"Sec. 1280.—Defendant's default. If the defendant shall *neglect to file his answer* to the petition

by the day named in the order of the court, after being served with notice thereof, the said court shall *thereupon* proceed to hear the said petition *ex parte,* within five days, thereafter," etc., etc., etc.

ARGUMENT.

I.

Pari materia with Article XIV, Sec. 1, and Amendment V, of the Constitution of the United States, Sections 1999–2001 R. S., U. S., and Chap. 42 of the Code of the District of Columbia are to be collated and it thus fully appears that there is a difference between protection in the form of *release* and, redress in the form of indemnity. The President must promptly demand the *release* of any American citizen, known to the President to be unjustly imprisoned in a foreign State; but he would refer the diplomatic duty to the Secretary of State, *when it arises on a claim* against that foreign country *for indemnity,* which is a part of proceedings, not for protection but for redress, not for release but for damages sustained prior to release.

The aggrieved citizen has the right to apply, by petition, to the Secretary of State, whose duty it is, when the petition to institute diplomatic proceedings in his behalf for redress is verified by the oath of the petitioner to proceed. If refused, he has the right to apply to the Supreme Court of the District of Columbia for the writ of mandamus against the Secretary of State, and for a rule against the defendant to show cause why the writ should not issue.

Compare errors (*e and f*) p. 15 *ante.*

*

After the time for interference by the President for his *release* from the false imprisonment has passed, and

Wharton, I. L. Dig., Sec. 46;

Virginia v. Rives, 100 U. S., 323, citing 3 Bl. Com. 110;

See 9 A. G. O., 356;

when the claim for *redress* is presented to the Secretary of State for his action, there being no courts in the foreign country competent to entertain jurisdiction over the *claim* for *indemnity*, if the highest court of that *foreign country* shall have *already decided* that the applicant *was* falsely imprisoned in Germany, this places the foreign government in the position of a defendant who confesses judgment, or pleads guilty of the outrage, and leaves the *quantum meruit* to be settled diplomatically as to the full amount. So far from having been compensatory to the citizen, the foreign final decision that his imprisonment was false, shows *liability* to a just demand in his behalf by the Government of the United States through the Department of State, which can not go behind the decision of the Prussian Landsgericht, which decision in both languages is in the possession of the defendant, as *res adjudicata*, and is to be *respected as such* in *both* countries; so that any man, or set of men, in either country, who denies or evades that decision, is guilty of *defamation of character*, and of manifest wrong to the exonorated claimant, and to third persons, viz., all citizens of the United States.

II.

The rule to show cause, to be issued on a petition for mandamus, is simply the well known common law process, for appearance, etc., issued on such petition and is analogous to the old writ of capias ad respondendum (now the writ of Summons) in certain other actions at C. L. and issues as of course.

Compare Errors Specification (*a*), p. 11 *ante*.

"The application was, in the first instance, for a rule to show cause why a mandamus should not is-

sue. This was made by a petition, stating the facts supposed to give a right to the writ, verified by oath. On proof of service of the rule, if no cause was shown, the mandamus issued in the alternative form, commanding the defendant to do the thing required, or show cause why he did not. To this he was bound to make a return, or answer, and was liable to attachment if he failed."

Cox, C. L. Prac., pp. 210-11, title "Mandamus."
Ib., pp. 221, 222.

III.

Whether the President or the Secretary of State is properly the defendant in a proceeding of this nature, has been satisfactorily settled by an authority, which the defendant in error is unable to combat without palpable self-contradiction—namely *his own*.

THE DEPARTMENT OF STATE HAS ITSELF TWICE ANSWERED THIS QUESTION, SAYING:

1. "When the matter is properly in the jurisdiction of the courts of a foreign government, the government of the United States does not interfere, except, when, after a diligent prosecution of all the remedies, which the law of the country affords, it turns out that there has been a denial of justice."

Assistant Secretary Davis to Moseby, June 23, 1873.
Wheaton I. L. D. p. 241, 2 ed. MSS. Dom. Let.

Assistant Secretary Loomis, May 11, 1903, says:

2. "As the case then stood before the Department, the conclusion reached by its letter of November 28, 1900, was that it had not been shown that Mr. Holzendorf had not adequate remedies to claim his damages, before the *local German tribunals*, nor that he had had recourse to and exhausted such remedies.

"The statement of the German attorney, Prerauer, does not go to the point. He states in his letter to Mr. Holzendorf that 'in regard to your demand for indemnity * * * our laws do not provide for the same.' The Department understands *that* to refer to the claim for international indemnity *which can only be claimed through diplomatic channels.* In such cases as this, ample remedies are afforded to claimants before the courts in the United States and it is *presumed* that similar remedies *are* given in Germany.

"If, however, you will show, or think you have shown, that Mr. Holzendorf has *no such remedy* before the German courts, *the Department* will refer Mr. Holzendorf's affidavit to our Embassy in Berlin, with instructions to report on the point. *Until that is settled* the *Department* does not feel that there would be anything gained by granting the hearing requested.

"I am, sir, your obedient servant,

"FRANCIS B. LOOMIS,
"Asst. Secy."

[The italics are ours.]

From letter to R. S. Tharin, Esq., Attorney for Mr. Holzendorf.

The "department" having forwarded the same, our ambassador at Berlin (after an unnecessary delay of eight months) reported, as counsel had contended, *that there were no German courts* having the requisite jurisdiction to consider such a claim for damages. According to the understanding between counsel for the plaintiff and the "department" the next step in regular order was to *present "the claim for international indemnity through diplomatic channels."*

Thus did Assistant Secretary Loomis admit that the Department of State *is* the *proper channel* through

which the *redress* demanded should be *presented* for "international indemnity," that is to say, that the Government of the United States, through the defendant was now bound to proceed diplomatically to seek the redress demanded. In this attitude the Assistant Secretary Loomis is in exact line with another Assistant Secretary of State, as will be seen from the following quotation:

> "When the matter is properly within the jurisdiction of the courts of a foreign government, the government of the United States does not interfere, except, when after a diligent prosecution of all the remedies which the law of the country affords, it turns out that there has been a denial of justice."
>
> Assistant Secretary of State Davis to Mr. Moseby, June 23, 1873, MSS. Dom. Let.
>
> (2 Wharton's 1. L. Dig., 2d Ed., p. 679.)

The Report of Our Ambassador, Dec. 9, 1903.—Extract.

> "I have received from the German Minister for Foreign Affairs a verbal answer to my note by which he informs me that in respect both of facts and law there is no ground upon which damages could be recovered for the said Holzendorf."

Counsel for the plaintiff had contended from the first that there were no such German courts and the report having (eight months after being called for) corroborated the contention; and all antecedents of the said Holzendorf as a Prussian subject having been by the Landgericht decided to have been and to be " entirely out of the question," it was a misdemeanor for the Assistant Secretary to recede from his own admission and from the

practice of the department, which amount to an agreement, and to base his refusal, even now, to do his duty upon the very things which are admittedly adjudicated finally and forever to be entirely out of the question. The defendant no longer falls back—he never did—upon the *President,* but whilst admitting that *he* is confronted by his plain duty, refuses to perform it, on "considerations" to quote the trial justice, "growing out of the personality of the petitioner," which considerations the guilty nation itself has occluded itself from pleading and which do not and can not belong to the "personality" of the plaintiff *as an American citizen.*

"The government of the United States recognizes the duty of obedience to local laws;" (Mr. Holzendorf was decided to have been, *as an American citizen, whilst sojourning in Germany,* "quiet," "peaceable" and "sound in mind and body") but *the duty is incumbent upon this government to exercise a just and proper guardianship over its citizens, whether at home, or abroad."* Secretary of State Frelinkhuysen to Kasson, Feb. 17, 1885.

Thus, after admitting that diplomatic proceedings through the Department of State are now in order, the preliminary report of our Ambassador to the defendant having been corroborative of the contention of plaintiff's attorney, the defendant places himself in the role of a public officer, having duties to the plaintiff, the due and "vigorous" performance of which "no other official, however exalted, can forbid,"

Marbury *vs.* Madison, 1 Cr. 166, 171 *top;*

and these duties need not be expressly enjoined by statute. Ib. 172 ¶ 6; *163.

"It is a general and indisputable rule that where there is a legal right there is also a legal remedy by suit, or action, at law, whenever that right is invaded." "Mandamus" is a law suit.

3 Bl. Com., p. 23.

"It is a settled and invariable principle in the laws of *England* that every right, when withheld, must have a remedy and every injury its proper redress."

Ib. id., p. 109.

Citing the above, Chief Justice Marshall says:

"The government of the United States has been emphatically termed a government of *laws* and not of *men*. *It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.*"

1 Cr. *163.

"The duty of the judges is to put such a construction upon the statute as shall suppress the mischief and enlarge the remedy—to add force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico.*"

Brown's Legal Maxims, p. [*83].

"*Ut res magis valeat quam pereat!*"

The full text of the letter of Mr. Prerauer, the German attorney referred to by the Assistant Secretary of State, is so entirely different in meaning from that stated by the defendant, that it is well to present it in

full to the court. Translated from the German language, as found on pp. 3 and 4 *ante*.

By inspection it will be seen that the letter of the German attorney (the translation whereof is admitted to be correct by the defendant in error) is misunderstood by the acting Secretary of State and that the omitted part shows that, so far from sustaining the Assistant Secretary's point, Mr. Prerauer distinctly disproves it:

1. That the *courts of Germany do not provide* such a remedy as the acting Secretary assumes to exist.

2. That *diplomatic action by the Department of State* is expressly suggested as the remedy.

Added to which are the admissions of the Assistant Secretary, in the department letter May 11, 1903, *ante* pp. 21, 22, *ante*.

> Wharton, I. L. Dig., §241; Letter from Assistant Secretary of State, Davis, to Mr. Moseby, Feb. 23, 1873, MSS. Dom. Let.
> Loomis to Tharin, May 11, 1903.

It is an elementary principle that rights and duties *allegiance* and *protection* are *reciprocal*. Without protection, the Crown would be a *usurper* of the right to *enforce allegiance*.

> Lord Brougham, Debate on the Irish Coercion Bill, 1833.

The United States "may demand that the laws of the foreign country be applied to her citizen in a just, equitable and impartial manner; that the due and ordinary procedure be adopted; that no arbitrary, or unusual, steps, or measures, be taken.' * * * (Such as those of the lower court, Amtsgericht.) "When a foreign temporary, or permanent, resident acquires rights as against a nation, * * * itself must afford him the regular customary means of enforcing these rights and

a final neglect, or refusal to do so is a *breach of international law* and gives the *nation*, of which the injured person is a *citizen good* and *just ground of complaint.* These principles are well established. No difference between native and naturalized citizens."

Pomeroy's I. L., pp. 249-251.
(Wharton, I. L. Dig., p. 390, 2d Ed.)
Seward to Adams, March 22, 1866, MSS. Inst. Gr. Brit.

"The presumption of innocence surrounds them as a shield at all stages of the proceedings until their guilt shall be established by competent and sufficient evidence.
Ib., id.

"Conviction and punishment of a citizen of the United States in a foreign country, in a trial" (such as that in the lower court, the Amtsgericht) "conducted with palpable injustice and in violation of settled principles of law" (as the appellate court, the Landgericht decided perspicuously to have been the case) "will be the basis of a claim for redress from such country by the government of the United States."

Evarts to Langston, April 12, 1878, MSS. Inst. Hayti.
Same to Same, Dec. 23, 1878; Nov. 3, 1880.
Bayard to Condert Bros., Oct. 7, 1885, MSS. Dom. C.
Treaties with Prussia of 1828 and 1850.
Evarts to Foster, Sept. 4, 1880, MSS. Inst. Russia.

"The *defense* of *res adjudicata* does not apply to cases where the *judgment* set up is in *violation* of *international law.*" 2 Wharton, I. L. Dig. 2d Ed., p. 671.

So that the defendant cannot go behind the Landsgericht's *final* decision *in our favor* and *defend* by the reversed proceedings of the lower court (the Amtsgericht) which court the Landsgericht pronounced without competent jurisdiction over an American citizen, who was only temporarily in Berlin and whose *domicil* was in the State of Utah, United States of America. But, as *our* claim is based upon *res adjudicata* in its true sense, and as the Landsgericht finally *decided* our rights to have been *falsely* invaded, and as there are no German tribunals competent to try our claim for indemnity for false imprisonment and so forth, it only remains to say that "the claimant is not required to exhaust justice in such a State, where there is no justice to exhaust."

Fish, Secretary of State to Pile, May 20, 1873, MSS. Inst. Venez. (2 Wharton, 2d Ed., p. 679).

"While citizens of the United States, traveling, or resident, abroad, are subject to the reasonable laws of the country in which they may be sojourning, it is nevertheless their *right* to be spared such indignity and mortification as the conduct of the officers at Loughrea and Atheney seems to have visited upon Mr. George.

* * * * * *

"And should it appear that these officials have in the case of such citizen misused the power entrusted to them, * * * the citizen wronged should receive such amends as the facts warrant. 2 Wharton, I. L. Dig., 630, 631. Frelinghuysen to Lowell, Oct. 3, 1882, MSS. Inst., Gr. Br., For. Rel., 1882.

"The State (United States) must be satisfied that its citizen has exhausted the means of legal redress offered by the tribunals of the country in which he has been injured. If these tribunals are *unable*, or *unwilling*, to entertain and adjudicate upon his *grievance*, the *ground for interference* is fairly laid." (Phillimore, 2, Int. Law 4.) The

commission of the wrong must be clearly established, the failure of local tribunals must be established. *Ibid., id.*

Bayard to Condert Bros., Oct. 7, 1885, MSS. Dom. C.

2 Wharton, I. L. Dig., 2d Ed., p. 670.

Bayard to West, April 28, 1886, Ib. id.

See also: Davis to Moseby and Loomis to Tharin, *ante* pp., ~~17, 18~~ 21, 22

"A fact which has existed can not be made never to have existed."

Marbury *v.* Madison, I Cr. 167.

"Passport" is conclusive evidence of citizenship.

Record (Pet.) ¶I, p. 1.

Field's I. L. Code, 166-7.

Right of expatriation, U. S. treaty with Prussia, 1850.

" Proper guardianship over citizens at home and abroad is a DUTY. A municipal act of another State can not abridge that DUTY, nor is such an act countenanced by the law, or usage of nations."

Frelinghuysen to Morgan, Feb. 17, 1885.

The Secretary of State is therefore in this case self-admitted to be that officer of the government whose duty is to diplomatically demand indemnity, pursuant to the power devolved on him as such, uncontrollable by the President, who did not confer and can not take away citizenship, which is not an " office."

Marbury *vs.* Madison, 1 Cr. 141, 151, 152, *163, 166.

IV.

The word "may" in the second line of Section 1274 means, in the present case, "shall," because it directs the

doing of a thing for the sake of justice, or the public good.

Safford *vs.* Morison, 63 Md., 14.
Co. Com. *vs.* Durkett, 20 Md., 468.
Mayor, etc., Balt. *vs.* Pendleton, 15 Md., 12.
R. S., U. S., Sec. 1999-2001, *pari materia* with Sections 1273–'74, code of Dist. Col., p. 18 *ante.*

The action of the trial-justice is founded on his misconception of his own authority and of the law of mandamus as it now stands in the code of the District of Columbia.

As to section 1274 of the District-code, the word "may" in its second line does not confer discretionary power upon the court in all cases. It is an elementary principle that, if there be another remedy, mandamus does not lie. So the word "may" was put into the statute as mandatory in cases like the present one, where there is no other remedy, the defendant-in-error having refused to seek redress for the wrongs and injuries sustained by the petitioner whilst sojourning abroad. If there were some other avenue through which the Kaiser of Germany can be reached by an American citizen seeking reparation, the court below might have some reason for its action, but as there can be "no wrong without a remedy," the justice below erred in so misconstruing the law as to reverse the maxim, *"ut res magis valeat quam pereat."*

The writ of mandamus is a C. L. writ, a suit at law, and chapter 42 of the District code is based upon the right of petitioner who complies therewith and applies for the writ *secundum statutum.*

No "considerations growing out of the personality of the petitioner" can "sustain the propriety of this action" of the court. His very advertence to such "con-

siderations" vitiates the entire action of the trial-justice and ought, *ipso facto,* to reverse his said action. It is vague and it is unjust to the petitioner, who, as to his "personality," was decently clad, decently behaved, and not at all personal to the justice, and whose antecedents as a subject of the Kaiser were no part of his legal personality as a citizen of this country.

In the case of Taylor *vs.* Mayor, etc., 64 Md., 68, held:

> "The defendant was under an *obligation* to *exercise* the powers conferred on it by its charter and this *duty* must be enforced by *vigorous* effort." [In this case the amended charter reads that the city council "may pass ordinances" for various salutary purposes. Please compare the prayer of the petitioner, Record p. 2, with the opening words of the opinion of the court below, Ib. p. 7, with this decision.]
>
> Constitution of U. S., Art. XIV, Sec. 1 and Amendments, Art. V.
>
> R. S., U. S., Sections 1999-2001 incl.
>
> Sec. 2001 refers to the *release* of a citizen from a foreign *prison,* and deals with *prompt "protection"* by the President (which in this case was not afforded). *Redress* is a matter of subsequent *diplomatic duty* of the *Secretary of State, the claimant* being now at home here, and evidently wronged by the flagrant abuse of his rights whilst sojourning abroad. This Common Law action applies to this claim, there being no other remedy.
>
> Sec. 1274 Code of said District.

In 4 Wall, 445, the case of "Supervisors *vs.* United States," Mr. Justice Swayne delivered the opinion, saying:

> "The act declares that the Board of Supervisors under township organization, in such counties as

may be owing debts which their revenue is insufficient to pay, *may if deemed advisable* levy a special tax," etc.

"The counsel for the respondents insists, with zeal and ability that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors and that judicial action cannot control the discretion with which the statute has clothed them. We can not concur in this view of the subject. Great stress is laid by the learned counsel upon the language, *'may, if deemed advisable,'* which accompanies the *grant of power,* and, as he contends, qualifies it to the extent assumed in his argument.

"In the King *vs.* Inhab, of Derby (Skinner, 370), there was an indictment against 'diverse inhabitants' for refusing to meet and make a rate to pay the constables' tax.' The defendant moved to quash the indictment, because they are not compellable, but the statute only says that *they may,* so that they have their election and no coercion shall be. The court held that 'may, in the case of a public officer is tantamount to *shall,* and, if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt.'*

"In the King and Queen *vs.* Barlow, 2 Salk., 609, there was an indictment upon the same statute and the same objection was taken. The court said: 'When a statute *directs the doing* of a thing, for the sake of *justice* or the *public good,* the word *may* is the same as the word *shall;* thus 23 Hen. VI says: the sheriff *may* take bail. This is construed he *shall,* for he is compellable to do so.'

"These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the *settled law of both countries.*

*Code of the District of Columbia, Sec. 1278.

"In the Mayor of City of New York, 3 Hill, 614, and in Mason *vs.* Fearson, 9 Howard, 248, the words 'it shall be lawful' were held also to be *mandatory.*

"The conclusion to be deduced *from the authorities* is that, *where power* is given to public officers, in the language of the act before us, *or in equivalent language—whenever the public interest,* or *individual rights call for its exercise—the language used, though permissive in form is in fact peremptory. What they are required to do for a third person the law requires shall be done. The power is given not for their benefit but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless.*

"In *all such cases,* it is held that the *intent of the legislature,* which is the test, was *not* to *devolve* a *mere discretion* but to impose 'a *positive* and *absolute duty.*'"

As to the laying of the rule, Sec. 1274 is mandatory. If the court please to act instead of leaving it to the clerk, "as of course," he *may*; but either he or the clerk *must.*

Cox's C. L. Prac., D. C., 121, 122; Johnes *v.* Johnes, 3 Dow. 15; S. P. Acheson and Everitt, Cowp., 391; 9 Law Lib. *753.

Otherwise, the applicant in the present case becomes a shadow, his citizenship a dream, his allegiance a farce, his rights vain imaginations, the duties of the Secretary of State, as a servant of the sovereign people nonexistent; protection a figment and the foreign country concerned the *licensed* and *unmolested oppressor* of innocent American citizens, "peaceably, quietly," and sanely sojourning there, who are left *without redress and entirely remediless.*

In Marbury *vs.* Madison, 1 Cr. 137, a mandamus is the proper remedy to compel a Secretary of State, when demanded through a court having original jurisdiction, to deliver a *commission* to which the party is entitled. The *passport* of an American citizen sojourning abroad, contrasted with the commission of a justice of the peace in this District renders the former all the more important and the *only remedy* for its violation is of even greater *necessity*. We asked of the trial-justice for no gift of a right, but to be put in the only possible way of trying our vested right (Sid. 286); for such is the intention of the privilege of the writ of mandamus, which was never intended to put a judicial obstruction, or obstructionist, or an irresponsible department, or branch of government, between us and our sole remedy, never intended to reduce American citizenship to a thing to be reviled and insulted *at home as well as abroad*. Specification (*e*) p. 15 *ante*.

The order and opinion of the courts below ignore official duty and responsibility, divest vested inalienable right, and, instead of enlarging liberty by a true and lawful (1 Bl. 87) construction of words, tend absolutely to restrict liberty and subvert right and justice. The *merits* of the case are in possession of this Supreme jurisdiction, who have the right and power to issue the writ of peremptory mandamus to the defendant in error commanding him to demand indemnity in accordance with law against the confessedly guilty nation, sounding in damages commensurate with the duration of the admitted false imprisonment and with the extent of his loss, mental distress and injuries at the hands of his oppressors whilst bearing the passport of an American citizen.

As to the *quantum meruit* we have not far to go. The same foreign country which has judicially confessd its liability to the plaintiff in error, set the pace as to the measure of damages, which the nation claiming redress should collect from the nation inflicting the injury. In 1897, Mr. Emil Luders, a subject of the Kaiser, was imprisoned at Port au Prince, Hayti, and the Kaiser sent his man-of-war the Nixie and at the cannon's mouth *collected damages* for *his* subject at the rate of twenty-five hundred dollars *per day* for every day of the imprisonment. Although an American citizen is at least as good as a German subject, and although the duration of Mr. Holzendorf's imprisonment is over fifty-eight times as long as that of Mr. Luders, yet, because of the seemingly friendly relations between the United States and Germany, our demand *is less than half that* rate *per diem* (namely, one thousand and seventy-two and ninety-six one hundredths (1,072.96) dollars per day for 466 days) and amounting to five hundred thousand ($500,000) dollars, as damages for what the Highest Prussian Court in Berlin decides to be a groundless wrong by an inferior incompetent judicial court which was without jurisdiction, and the said highest court mulcted the royal treasury with the costs, the royal attorney-general of that foreign country having conducted for the government the latter's unsuccessful defense before the said highest court (the Landgericht).

At the rate assessed by the Kaiser for the false imprisonment of *his* subject by a republic, our claim would attain the dimensions of a million one hundred and sixty-five thousand dollars in favor of our fellow citizen —so much more barbarous and protracted was the flagrant abuse of his rights by the empire than that inflicted upon the Kaiser's subject by a republic; and if the

same mode of collecting the damages were adopted by this country against an empire which that empire adopts against republics, we would not only demand, but collect the entire sum and, in order to restore American citizenship as a great and honorable distinction, we would add exemplary damages to protect the citizens of this country when "quietly and peaceably" sojourning abroad from insults and oppression. The duration and indignity upon and the increasing losses, sufferings and mental anguish of the American citizen now claiming redress therefor, are elements of the *quantum meruit,* because of the tantalizing nature of the peculiar charge of the foreign government, adjudicated finally to be absolutely false as against the American citizen, as such, by the tribunal of that foreign country which foreign country thus confesses its guilt before the civilized world.

> "The petitioner is warranted in appealing to the Government to interfere for *redress.*"
>
> Buchanan to Osma, Feb. 1, 1848, MSS. Notes, Peru.
>
> Wharton I. L. Dig. 2d Ed., p. 432.

Right to protection an international right.

Pomeroy, I. L., Ch. VI, A., p. 245.

The petitioner, having unsuccessfully applied to the tribunals, or there being no such tribunals, of the foreign country, for *redress,* and not having received protection whilst in Dalldorf, a prisoner from the President; and the Embassy also having failed to listen to his plea, although repeatedly applied to, comes into court with clean hands (see Record, p. 2, parts III and IV), and without any other remedy than writ of mandamus, com-

mencing his proceedings therein with a petition therefor and applying, under the statute, for the laying of the rule, the defendant should have been brought with the documents referred to in the petition as in his possession, *coram judice,* in the first jurisdiction applied to.

Assistant Secretary Davis to Mr. Moseby, June 23, 1873, MSS. Dom. Let. Wharton, 1 L. Dig. § 241, 2d Ed., p. 679.) Quoted ante, Asst. Sec. Loomis to Tharin, May 11, 1903.

"The government of the United States recognizes the duty of obedience (by our citizens abroad) to local laws, but the *duty* is incumbent upon this Government to exercise a just and proper guardianship over its citizens whether at home or abroad."

Secretary of State Frelinghuysen to Morgan, Feb. 17, 1885:
MSS. Ins. Mex. (2 Wharton, I. L. Dig., 2d Ed., pp. 437-8.)

But local laws can not disturb, or affect the relationship existing at all times between this Government and one of its citizens. Ib. id. (Const. U. S. Amend. Art. V.)

"Treaties do not create the personal rights of men; they may recognize their existence and define their exercise within certain practical and convenient bounds."

Same to Same, July 24, 1882, Wharton 2d Ed., p. 332.

Remark: Courts do not create them, but *must recognize them,* not merely as shadowy things which any official can anihilate at discretion, but as vested inalienable rights. Protection and redress are the price of allegiance.

Proper guardianship over a citizen at home and abroad is *a duty*. The law and *usage* of nations does not countenance its abridgment.

> **Frelinghuysen to Morgan, Feb. 17, 1885, *ut supra*. 1 Cr. 137; 5 McL., 9; 1 Hall, L. J., 429, S. P., 7 Cr. 589; 1 Pet. 346 per Johnson, J.; 10 Pet., 80; 12 Pet., 525, S. C. 5 Cr., 163; 2 C. R. 170; 3 Bl. C. C. 117; 21 L. R. 341; Dev. C. C., 21.**

The duty of the Secretary of State is clear; the action required of him in *this* case is *ministerial*, and the foreign government is responsible. "What is there in the exalted station of the office (Secretary of State) which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid the court to listen to the claim, or to issue a mandamus, demanding the performance of a duty not depending on executive *discretion*, but on particular acts of Congress and the *general principles of law?*"

> **Marbury *v.* Madison, 1 Cr. 170, et seq., p. 170.**

42 / **The Revised Statutes of the United States, Sections 1999–2001 and chapter ~~24~~ of the District of Columbia render it obligatory upon, *not discretionary* with, the executive to see to it that naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same *protection* of persons and property which is accorded to native-born citizens. This is mandatory and can not be evaded by *neglect*. Two wrongs do not make wrong right. The duty of *redress* remains incumbent upon that Department charged by invariable custom with *diplomatic matters*. The Secretary is in this respect a public officer, and can not be forbidden by the President, or excused by the President's silence, or by his own neglect to have**

brought the claim before the President long ago, from performing his present duty. No such defense has been openly made *by the defendant*, or can be made.

Ib. id., p. 171.

Davis to Moseby, } *ut supra.* pp. 21, 22, ante
Loomis to Tharin, }
3 Bl. Com., 110.

The judicial oath of the trial-justice should have constrained him all the more that he was prejudiced personally against the plaintiff, and consciousness thereof disqualified him from presiding then and there.

See Rec., "Note," ¶ 5, p. 4.

> "Although the Secretary of State is 'a high officer, he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States that any ministerial officer having public duties to perform should be *above the compulsion of law* in the exercise of those duties. * * * A specific civil remedy to the injured party can only be obtained by a writ of mandamus. If it can be awarded by this court in *any* case, it may be issued to a Secretary of State; for the act of Congress expressly gives the power to award it, 'in cases warranted by the *principles* and *usages of law*, to *any* persons holding offices under the authority of the United States.'
>
> "Many cases may be supposed in which a Secretary of State ought to be compelled to perform his duty specifically." Marbury *v.* Madison, 1 Cr. 149-150.

The most important of all his functions is to enter into diplomatic relations for redress from foreign countries for flagrant abuse of the rights of our citizens abroad.

Respectfully submitted,

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